STATE OF MICHIGAN

IN THE SUPREME COURT

GERARD J. WIATER,

Plaintiff-Appellee,

-vs-

GREAT LAKES RECOVERY CENTERS, INC.,

Defendant-Appellant.
_____/

Supreme Court No. 128139
Court of Appeals No. 250384
Lower Court No. 03-40316-NO

Robert T. Finkbeiner (P13433)
Attorney for Plaintiff-Appellee
Robert T. Finkbeiner, P.C.
1229 W. Washington Street
Marquette, MI 49855
(906) 228-2800

Michael G. Summers (P27241)
Attorney for Defendant-Appellant
_____/

28139
fp

PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF AND ARGUMENT AUTHORIZED BY COURT ORDER

Robert T. Finkbeiner
Robert T. Finkbeiner, P.C.
1229 West Washington Street
Marquette, MI 49855
(906) 228-2800

Dated: December 7, 2005

LAW OFFICES OF
BERT T. FINKBEINER, P.C.
29 W. WASHINGTON STREET
MARQUETTE, MICHIGAN
49855
(906) 228-2800

TABLE OF CONTENTS

LAW OFFICES OF
ROBERT T. FINKBEINER, P.C.
229 W. WASHINGTON STREET
MARQUETTE, MICHIGAN
49855
(906) 228-2800

INDEX OF AUTHORITIES

CASES **PAGE NO.**

LAW OFFICES OF
ROBERT T. FINKBEINER, P.C.
129 W. WASHINGTON STREET
MARQUETTE, MICHIGAN
49855
(906) 228-2800

FACTS AND ISSUES

This Court has asked the parties to include among the issues to be discussed three things:

1. Whether the danger was open and obvious.

2. Which party has the burden to prove that a special aspect exists.

3. Whether Defendants failure to undertake measures to diminish the alleged risk itself constituted a special aspect under *Lugo v Ameritech Corp., Inc.*, 464 Mich 512, 516 (2001).

The Plaintiff feels it is important that this Court understand some of the facts surrounding this accident. Great Lakes Recovery Centers, Inc. operated an alcohol and drug assessment and treatment center in Marquette, Michigan. The building was a small commercial building where the employees of Great Lakes Recovery Centers, Inc. treated numerous patients and walk-in customers, many of which were sent for assessments and treatment by various Courts around the U.P. It is a commercial enterprise much like a doctor's office or other professional offices.

There was a black top parking lot which was relatively level in front of the building and the Plaintiff, Gerald J. Wiater, parked in the closest parking space to the building that was not handicapped. He used the entrance designated for customers and other invitees. This Court's Decision in this case will affect all other commercial establishments similarly located in the State of Michigan.

LAW OFFICES OF
BERT T. FINKBEINER, P.C.
29 W. WASHINGTON STREET
MARQUETTE, MICHIGAN
49855
(906) 228-2800

ARGUMENT AND AUTHORITY

A. "Open and Obvious"

The Plaintiff himself does not believe that this danger was open and obvious but based on the Court of Appeals Ruling, the Plaintiff would concede that he knew the conditions could be slippery under the circumstances. Unfortunately, because of the Plaintiff's injuries, he has no recollection of any aspects of this accident. He knows that he was walking carefully because it was winter. [Waiter dep., p. 59] Defendant-Appellant would have the Court believe that because he had already walked across a portion of the parking lot and on the sidewalk, that he would be aware of these conditions. Unfortunately, that is not the case in the winter time in the Upper Peninsula of Michigan. Residents of the Upper Peninsula are used to heavy accumulations of snow and icy conditions from time to time. This does not mean that a resident of the Upper Peninsula or of the Lower Peninsula of Michigan would necessarily anticipate that every time they walk somewhere in the winter that they will encounter slippery icy conditions. In fact, when residents of Michigan attend to their daily needs, such as grocery shopping, appointments and other commercial endeavors, they have come to rely on the owners and operators of these commercial businesses to take reasonable steps to see to it that snow and ice do not accumulate in their walkways or entrances. When an elderly person goes to the drug store to fill their prescription, they do not expect ice and snow in the entrance and

LAW OFFICES OF
BERT T. FINKBEINER, P.C.
29 W. WASHINGTON STREET
MARQUETTE, MICHIGAN
49855
(906) 228-2800

walkway. When it has not snowed for several days, most merchants make a point to make sure that their entrances and walkways are free and clear of ice and snow and safe for their customers. Since the Plaintiff cannot recall seeing the ice, we do not know if it was open and obvious to him.

B. "Special Aspect - Burden of Proof"

The Defendant-Appellant argues that no special aspects were presented by the Plaintiff showing that the condition was unreasonably dangerous if it was open and obvious. The testimony from the Plaintiff's companion and witness, Lynn LaVictor, clearly indicates that there were special aspects. This issue will be discussed in part C. of this Brief. The Plaintiff-Appellee can find no cases that would indicate that the burden of proof would be on the Defendant-Appellant and concedes that the burden of establishing special aspects rests with the Plaintiff-Appellee.

The Plaintiff believes that the deposition testimony of the witness, Lynn LaVictor, clearly raised the issue of "special aspects." Mr. LaVictor testified that it was his week to remove snow, clear the walk and put out salt as needed. [LaVictor dep., p. 53-54] Mr. LaVictor further testified that he had requested the management to provide ice salt several times for a week before the accident which occurred on March 6, 2001. He further testified that the management of Great Lakes Recovery Centers, Inc. failed to provide any additional salt and that he used table salt a few days before this accident. [LaVictor dep., p. 54]

LAW OFFICES OF
BERT T. FINKBEINER, P.C.
29 W. WASHINGTON STREET
MARQUETTE, MICHIGAN
49855
(906) 228-2800

Last, but not least, Mr. LaVictor testified that on Sunday, March 4, 2001 two days before this accident occurred on March 6, 2001, someone had slipped and fell on the ice in this area. His testimony indicates that the Defendant was aware that they were out of rock salt and that they had a very slippery area in front of the building that was a danger to any of their business invitees. That evidence supports the Court of Appeals Decision. The Court of Appeals was correct when they determined that there were special circumstances in this case that made the icy parking lot unreasonably dangerous.

C. "Special Aspects"

That the Plaintiff Appellee has raised a general and material issue of fact as to whether a special aspect existed at the time of this accident. The Court of Appeals specifically found that the ice in this parking lot was unavoidable to a person who parked a vehicle in a parking lot and proceeded to enter the Defendant's facility. In fact, the Court looks to the Supreme Court's comments in the *Lugo* case concerning the hypothetical example of standing water in front of the only exit from a commercial building which would be a special aspect because "a customer wishing to exit the store must leave the store through the water." In other words, the open and obvious condition is effectively unavoidable. *Lugo*, supra at 519

While the Court of Appeals has stated the law and facts on which they have rendered their opinion, there are other aspects of this case that the Supreme

LAW OFFICES OF
)BERT T. FINKBEINER, P.C.
:29 W. WASHINGTON STREET
MARQUETTE, MICHIGAN
49855
(906) 228-2800

Court should look at. If a premises possessor owes a duty to an invitee to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition, and if an icy condition at the entrance to a person's business is not something the business owner has to anticipate, the Court will effectively be saying that any slip and fall on commercial property in the winter time caused by ice and/or snow is not actionable. In this case, where there is an issue of fact whether the land owner was aware of the condition for at least seven days and where another individual had already slipped and he is still not responsible for correcting the condition, there would be no need for any commercial enterprise to shovel their entrance and to apply sand or salt to prevent accidents. The landowners would never be able to be held accountable for accidents that they could have prevented. This would apply to elderly people entering a pharmacy or medical office, as well as all other commercial traffic in the State of Michigan.

In our case, the Court of Appeals found that "It should have been apparent to the Defendants that invitees who parked in the parking lot could not safely do so. We reject Defendant's argument that it should avoid liability because Plaintiff chose to park in the parking lot since Defendant made the lot available to invitees generally despite its icy condition." Lower Court Decision, page 3. The Court of Appeals went on to find that there was a genuine issue of material fact as to whether a special aspect made this situation unreasonably dangerous. The special

LAW OFFICES OF
BERT T. FINKBEINER, P.C.
29 W. WASHINGTON STREET
MARQUETTE, MICHIGAN
49855
(906) 228-2800

aspect was that the condition was effectively unavoidable and the condition had existed for at least a week with no remedial action being taken to prevent these accidents.

CONCLUSION

The Defendant-Appellant has the burden of demonstrating to this Court that they should grant leave to address the issues outlined above. The Court of Appeals in a well reasoned Decision has followed the most recent directives of this Court laid out in the *Lugo* Decision. If this Court rules that this case does not have any special aspects that contributed to Plaintiff's injury, this will effectively close the door on any and all slip and fall accidents that occur as a result of an accumulation of ice and/or snow in the winter time in Michigan. The special aspect of this case is the fact that the landowner or possessor knew of the dangerous condition and was the only one who could effectively correct that condition. If seven days is not long enough to be on notice of these icy conditions, what time frame would be adequate? The Decision of the Court of Appeals in this case should be upheld.

REQUEST FOR RELIEF

Plaintiff, Gerard J. Wiater, requests that this Court deny leave to appeal and allow the Court of Appeal's Decision to stand and allow this matter to proceed to Trial in the Circuit Court.

Respectfully submitted,

ROBERT T. FINKBEINER, P.C.

By: _____

Robert T. Finkbeiner
Attorney for Plaintiff-Appellee
1229 West Washington Street
Marquette, MI 49855
(906) 228-2800

Dated: 12-7-05

LAW OFFICES OF
ROBERT T. FINKBEINER, P.C.
29 W. WASHINGTON STREET
MARQUETTE, MICHIGAN
49855
(906) 228-2800